A. D. FINDLAY, APPELLANT
VERMILLION CLIFF CATTLE COMPANY, INTERVENOR

IBLA 75-54 Decided March 25, 1977

Appeal from a decision by Administrative Law Judge Robert W. Mesch affirming rejection by District Manager, Arizona Strip Grazing District, of applications for grazing privileges on federal range lands within the Arizona Strip District. Arizona 1-73-1.

Affirmed.

1. Administrative Authority: Estoppel--Estoppel--Federal Employees and Officers: Authority to Bind Government-- Grazing Permits and Licenses: Adjudication-- Regulations: Waiver

   Where an applicant for grazing privileges does not show the type of misconduct which would be a basis for estoppel against the Government, the provisions of 43 CFR 4115.2-1(e)(9)(i) and (e)(13)(i) cannot be waived on the basis of such misconduct.

2. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Base Property (Water)--Grazing Permits and Licenses: Federal Range Code

   Where base property qualifications have been recognized and grazing licenses thereon have been granted for 3 or more consecutive years to a third party, an applicant is barred by 43 CFR 4115.2-1(e)(13)(i) from seeking readjudication, although the Bureau of Land Management has the authority under subsection (e)(13)(ii) to make adjustments when necessary to comply with the Federal Range Code for Grazing Districts.

3. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Base Property (Water)--Grazing Permits and Licenses: Federal Range Code

   Upon failure to apply for base property qualifications for 2 consecutive years, under 43 CFR 4115.2-1(e)(9)(i) an applicant loses any claim to grazing privileges which he had transferred to another, where the exceptions in the section are not applicable.

4. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Base Property (Water)--Grazing Permits and Licenses: Federal Range Code

   Upon approval of an application for transfer of class 1 qualifications, the transfer is effective as of the date of filing of the application, and the base property from which the transfer is made thereupon loses its qualifications to the extent indicated in the transfer.

APPEARANCES: H. James Clegg, Esq., Worsley, Snow & Christensen, Salt Lake City, Utah, for appellant; Frank J. Allen, Esq., Salt Lake City, Utah, for Intervenor; Fritz L. Goreham, Esq., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GOSS

A. D. Findlay appeals from the Administrative Law Judge's decision affirming the rejection by the District Manager, Arizona Strip Grazing District, of Findlay's applications for active use grazing privileges on certain federal range lands within the District.

Three federal range allotments, designated as Nos. 205, 214A and 215A, are involved. No. 205 has been licensed to Vermillion Cliff Cattle Company, the intervenor herein, since at least 1965, and has never been held by appellant or his family. Nos. 214A and 215A were purchased in 1963 by Vermillion from appellant's brother, Lynn Findlay, and the two allotments have been licensed to Vermillion since 1963.

Appellant and Lynn Findlay initially held jointly allotments Nos. 214 and 215, which they inherited in early 1962 from their father, who had established the grazing privileges, as well as

another allotment not material here. By means of a rangeline agreement which was approved by the Manager of the Grazing District on June 5, 1962, the two brothers divided the use of these jointly held allotments, with Lynn Findlay obtaining exclusive use of Nos. 214A and 215A, as the allotments then became designated. Pursuant to the division and in order to divide Class 1 grazing privileges equitably, the brothers in September 1962 transferred grazing privileges of 5700 AUM's 1/ from recognized water base which they owned jointly to other water sources which related for grazing privilege purposes to Lynn Findlay's Nos. 214A and 215A. 2/ This transfer was approved by the Manager of the District on April 19, 1963. Shortly thereafter, Lynn Findlay sold his rights in Nos. 214A and 215A to Vermillion.

In 1972 appellant first applied for exclusive grazing use in Allotment No. 215A and in a portion of Allotment Nos. 214A and 205. After adverse recommendation by the District Advisory Board, the District Manager denied appellant's request. Thereupon, appellant requested a hearing before an Administrative Law Judge; the hearing was held and the Administrative Law Judge ruled against appellant.

As to Allotment No. 205, in which appellant had no prior legal interest, and as to Nos. 214A and 215A, appellant argues that Vermillion has insufficient base water 3/ to properly qualify for its licenses, that only appellant has sufficient water in the area, and that the Bureau of Land Management is in violation of the Federal Range Code 4/ in continuing the licenses to Vermillion. Further, appellant maintains with respect to Nos. 214A and 215A that the September 1962, transfer of the 5700 AUM's (later conveyed by Lynn

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1/ See 43 CFR 4110.0-5(o).

2/ Appellant maintains in his Statement of Reasons that:

"* * * in September of 1962 A. D. Findlay transferred to Lynn F. Findlay water base privileges for 5700 AUM's with the express understanding that sufficient water to sustain these rights would have to be developed. Some of the water sources to which these privileges were transferred had not been constructed; none provided full-time water without further development. To this date, the record shows that the water 'sources' receiving this transfer of water base privileges have never produced the full-time water necessary to sustain a Class 1 water base permit."

3/ As expressed by the District Manager in a March 1, 1971, letter which appellant introduced as his Exhibit 2, "[a]llowance of any license within the Arizona Strip is based upon control of 'full time water' as base property." See 43 CFR 4110.0-5.

4/ 43 CFR 4110.0-5(b).

Findlay to Vermillion) was void ab initio for failure to be supported by actual base water sufficient to meet the qualification standards mandated by the Federal Range Code. Finally, appellant contends that he is not estopped under 43 CFR 4115.2-1(e)(13)(i), from attacking the licenses issued to Vermillion, 5/ but that the Government should be estopped from barring appellant under subsections (e)(9)(i) and (e)(13)(i).

[1] Appellant maintains that he failed to apply for the transferred privileges from 1963 to 1972 and did not seek readjudication of Vermillion Cliff's rights because he relied on representations by BLM officials and Vermillion that adequate base water would be developed to properly support Vermillion's privileges. However, the Department is bound by its regulations, 6/ and appellant has not shown the type of conduct which would be a basis for estoppel against the United States. Cf., e.g., Matter of
Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975).

[2] The record shows that since 1963 (for Allotment Nos. 214A and 215A) and since at least 1965 (for Allotment No. 205), the respective base property qualifications have been recognized and licenses thereupon have been granted to Vermillion. 43 CFR 4115.2-1(e)(13)(i) 7/ states:

> No readjudication of any license or permit * * * will be made on the claim of any applicant or intervener with respect to the qualifications of the base property * * * where such qualifications or such allotment has [sic] been recognized and license or permit has been issued for a period of three consecutive years or more, immediately preceding such claim.

Appellant argues that he is not barred by the 3-consecutive-year limitation because (1) the transfer to his brother was void ab initio, and (2) BLM contravenes the Federal Range Code in continuing to grant the pertinent licenses to Vermillion.

There is no exception in section 4115.2-1(e)(13)(i) to permit attack upon licenses or permits which allegedly are based on transfers void ab initio. Subsection (e)(13)(i) is similar to a 3-year statute of limitations, during which period objections may be made. Appellant maintains that his void ab initio argument with respect

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5/ At the hearing, appellant argued the effect of an alleged reverter agreement between the brothers as part of the 1962 transfer of grazing privileges. This issue was not raised by appellant upon appeal.
6/ McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955).
7/ Formerly 43 CFR 161.6(e)(13)(i).

to subsection (e)(13)(i) is buttressed by the language at subsection (e)(13)(ii). It is clear, however, that subsection (e)(13)(i) limits the authority for private parties to seek readjudication of privileges, 8/ while subsection (e)(13)(ii) defines the authority of the BLM to readjudicate privileges. Although subsection (e)(13)(ii) does grant general authority to the BLM to readjudicate at any time, subsection (e)(13)(i) specifically denies any applicant the authority to seek the readjudication. Malvin Pedroli, 75 I.D. 63 (1968).

Subsection (e)(13)(i) was promulgated to provide stability in range livestock operations, considered necessary since development of livestock resources requires long-range planning; such an approach is in accordance with the purposes of the Taylor Grazing Act of 1934, 43 U.S.C. § 315 et seq. (1970). 9/ Phil J. Hillberry, 24 IBLA 283, 288 (1976). Such procedures do not deny fundamental fairness, because a full 3 years is allowed within which applicants and intervenors may seek readjudication of a license or permit.

Appellant also claims that he is entitled to relief in this action, despite section 4115.2-1(e)(13)(i), because of the illegality of the actions of BLM in continuing to issue licenses to Vermillion without sufficient base water. Appellant argues:

> * * * The estoppel provision relied upon by the Government is not controlling because the BLM must issue permits in accordance with the qualification provisions of the Federal Range Code; to do otherwise is to abuse their discretion. Their actions are not legitimized nor is appellant estopped where the actions taken are in derogation of existing regulations.

Appellant cites 43 CFR 4111.3-1(c) and (d)(2)(i-ii), which state that preference is to be given to those with sufficient land or water, and specify the order in which such preferences are to be granted. Appellant alleges that he is the only party controlling adequate base water in the service area.

The District Manager must of course comply with the regulations re base property qualifications. However, under section 4115.2-1(e)(13)(i) appellant is precluded from obtaining the relief

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8/ Delbert Allan, 2 IBLA 35 (1971).

9/ The preamble to the Taylor Grazing Act reads:

"AN ACT * * * To stop injury to the public grazing lands * * *, to provide for their orderly use * * * and development, to stabilize the livestock industry dependent upon the public range * * *." (Emphasis added.)

he seeks as a part of this appeal. Mrs. Mildred Carnahan, 10 IBLA 150 (1973); Phil Hillberry, 8 IBLA 428 (1972).

As to the responsibility of BLM outside the framework of this appeal, the Administrative Law Judge stated in his decision at 8:

> I might note, however, that while the evidence is somewhat confusing, difficult to grasp and, in many respects, lacks any reasonable degree of clarity, it does, at least in certain areas, indicate that the intervenor's allotments might not be properly and fully serviced with adequate water. On the basis of the evidence, it would certainly seem appropriate for the District Office to pursue the position adopted at an Advisory Board Meeting on February 25, 1971, and announced in a letter issued by the District Manager on March 1, 1971, relating to the responsibility of all licensees to maintain their base property qualifications as required by the Federal Range Code.

The Board accordingly suggests that BLM review the matter further, and if appropriate, take necessary action under section 4115.2-1(e)(13)(ii). Phil J. Hillberry, supra at 24 IBLA 288; W. Dalton La Rue, Sr., 9 IBLA 208 (1973); Benny Lucero, 8 IBLA 46 (1972); Malvin Pedroli, supra.

[3] Departmental regulation 43 CFR 4115.2-1(e)(9)(i) 10/ also precludes appellant from obtaining the privileges sought. That section provides:

> Base property qualifications, in whole or in part, will be lost upon the failure for any two consecutive years:
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> (i) To include in an application for a license or permit or renewal thereof, the entire base property qual and nonuse * * *.

Thus, appellant lost any claim to those grazing privileges transferred to the benefit of Allotment Nos. 214A and 215A in 1962 when he did not apply for such privileges from 1963 until 1972. Mrs. Mildred Carnahan, supra. This would obtain even if the transfer of privileges to his brother were deemed to have been void ab initio.

10/ Formerly 43 CFR 161.1(e)(9)(i). The exceptions in the regulation are not applicable.

[4] Appellant is further barred from now claiming rights in allotments 214A and 215A because he is bound by the consequences of his 1962 transfer. As stated in the Administrative Law Judge decision at 4-6:

> 1. When the transfers of base property qualifications or grazing privileges were approved in 1963, the base property held by the appellant lost its class 1 qualifications to the extent of the privileges transferred by reason of 43 CFR 4115.2-2(b)(3). This section of the regulation provides:
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> > * * * Upon approval of the application by the District Manager after reference to the advisory board, the transfer shall be effective as of the date of filing of the application, and the base property from which the transfer is made will thereupon lose its qualifications to the extent indicated in the transfer.
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> The appellant contends, however, that when the property division was made with his brother and a portion of the grazing privileges were transferred from the original base property to other base water, it was recognized by all concerned that (1) the base water to which the privileges were transferred were not sufficient to support the privileges, and the water would have to be improved or developed in order to hold the privileges, and (2) if his brother did not develop adequate water within a reasonable period of time, the grazing privileges would automatically revert back and attach to the original base property that the appellant held. The appellant further asserts that the District Office arbitrarily and continually granted extensions of time to his brother and to the intervenor within which to develop the necessary water and since, after some ten years, sufficient water has not as yet been developed, he is now entitled to the class 1 grazing privileges that were transferred to his brother as a part of the property settlement. The appellant, in effect, argues that the District Office should, by some means, transfer the class 1 base property qualifications from the recognized base water held by the intervenor to the water held by the appellant, which at one time supported the grazing privileges.

The range line agreement between the appellant and his brother and the documents relating to the transfer of grazing privileges do not contain anything that would indicate in any way that the grazing privileges were being transferred conditionally or that they were subject to a possible reversion to the appellant. In fact, the documents are worded in terms of a complete and unconditional transfer and correspond in all respects with the appellant's acknowledgement at the hearing that the parties intended to make an even distribution of the property obtained from their father.

In any event, it has been the traditional position of the Department that matters of private contract dispute are for the courts and not the Department to decide. See David L. Mills, A-26949 (September 27, 1954); L. N. Hagood et al., 62 I.D. 415 (1955); John H. Corridon, A-27390 (February 18, 1957). Under the circumstances in this case, the appellant's rights, if any, to obtain a transfer of the class 1 grazing privileges from the intervenor's property to his property should be pursued in the courts and directed against the intervenor, a possible bona fide purchaser, and also against any [encumbrancer] of the intervenor's base property from which the transfers should allegedly be made. Cf. 43 CFR 4115.2-2(b)(3).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joseph W. Goss
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Anne Poindexter Lewis
Administrative Judge